Table of Authorities Cited

Statutes

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28 U.S. Code Section 2255	1, 2
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No. 749

ADOLPHO RODRIQUEZ,
Petitioner,

vs.

UNITED STATES,
Respondent.

REPLY BRIEF FOR PETITIONER

It is apparent from the Brief for the United States that the Solicitor General has for all practical purposes abandoned the only reason given by the District Court and the Court of Appeals in denying petitioner's application and motion for relief under 28 U.S. C.A. 2255. The District Court and the Court of Appeals denied relief solely upon the ground that petitioner in his motion had failed to make a showing of "plain reversible error in the trial." This requirement of the Ninth Circuit is squarely in conflict with the other circuits which have passed upon the point and the Solicitor General in the Brief for the United States does not seriously urge that such a showing should be a prerequisite to relief under Section 2255. (Brief for the United States, p. 11.) In effect the Solicitor General concedes that the requirement of the Ninth Circuit is erroneous and that the rule established in the other circuits is correct.

The Solicitor General does argue that the District Court and the Court of Appeals did not err on the record before them, since they did not have the more detailed version of events set out in the Petition for Writ of Certiorari in this Court. (Brief for the United States pp. 6-7.) It seems clear, however, that even if the petitioner had set out the more detailed version in the documents in the Courts below, this would not in any way have affected the rulings of the District Court and the Court of Appeals, since their decisions are clearly based upon the "plain reversible error" requirement previously established in the Ninth Circuit.

The Solicitor General now argues only the mechanics to be followed to permit petitioner to obtain the relief sought. The Solicitor General would require that the petitioner file a new motion under Section 2255, supporting it with a sworn petition or affidavit. This seems a wholly unnecessary and formalistic requirement, since the allegations referred to have already been sworn to by the petitioner in his Petition for Writ of Certiorari in this Court. It is further suggested by the Solicitor General that even if this requirement is met, the Court need not in all cases order a hearing, but could determine his right to a hearing and deny it ex parte upon receipt of an affidavit of his former counsel. This suggestion would seem to be directly contrary to the statutory mandate contained in Section 2255:

> "Unless the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief, the court shall cause notice

thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." (Emphasis added.)

The petitioner asks only that his right to appeal be restored, and that this be done upon a showing that he was wrongfully deprived of that right. The sole issue to be determined at such a hearing is whether the failure to file the written notice of appeal was or was not the result of the considered choice of the petitioner. Petitioner has alleged that he did want to appeal and so advised the interpreter and his attorney. Whether or not an oral notice of appeal was made in open court at the time of sentencing is wholly immaterial, since it would have been ineffective.

We have been furnished the reporter's partial transcript of the proceedings had at the time of judgment and have printed it as an appendix to this reply brief. This clearly supports petitioner's assertion that he wished to appeal and that he was deprived of the effective assistance of counsel during the critical 10-day period thereafter. It is quite apparent from the transcript that counsel (in moving for leave for petitioner and his wife to proceed in forma pauperis) was retiring from the case, but that petitioner wished to appeal. The motion would be wholly meaningless unless petitioner wished and intended to proceed further by way of appeal. The Court refused to entertain the motion at the time, stating that it was late in the morning and that all motions had to be in writing.

This motion by counsel not only showed that petitioner wished to appeal, but clearly indicated to the Court that counsel was retiring from the case and that from that moment the petitioner was without counsel. At that moment it was the duty of the Court under Rule 37(a) to advise the defendant of his right to appeal and to either appoint counsel or direct the clerk to prepare and file the necessary written notice of appeal.

It is respectfully submitted that under the circumstances the judgment shall be reversed and remanded to the District Court with instructions to grant to petitioner what the Solicitor General refers to as "in effect a late appeal". (Brief for the United States, p. 7.) The method of accomplishing this result is immaterial (i.e., whether by direct review or by vacating the sentence and resentencing petitioner). It is submitted, however, that in view of all the circumstances noted above, petitioner's desire to appeal was clear and that he should be permitted to do so without the necessity of a further hearing below.

Dated, San Francisco, California,
March 19, 1969.

Respectfully submitted,
WILLIAM ROSS WALLACE,
Counsel for Petitioner.

JOHN R. PASCOE,
WILLIAM R. RAY,
Of Counsel
On the Brief.

(Appendix Follows)

Appendix

In the United States District Court
For the Northern District of California
Northern Division

Before Hon. Thomas J. MacBride, Judge.

CR. No. 13,611

United States of America, Plaintiff, vs. Adolpho Rodriquez, Etta Mae Rodriquez, Alberto Morales Amaro, Ramon Amaro Villa, Juan Bautista Barragan, and Francisca de Gontes Ceja, Defendants.

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS HAD AT TIME OF JUDGMENT

Appearances:

For the Government:	Cecil F. Poole, United States Attorney, By: Alan R. Porterfiled, Assistant United States Attorney.
For Defendants Adolpho and Etta Mae Rodriquez:	Paul J. Melee, Esq.
For Defendant Amaro:	Howard P. Welch, Esq.
For Defendant Barragan:	Paul A. Berg, Esq.

Sacramento, California, Thursday June 20, 1963;
9:30 Calendar

(Motions for Judgment of Acquittal and New Trial heard and denied.)

. . . . .

The Court: Now, as to the Defendant Adolpho Rodriquéz the sentence will be that he is to be confined to a penal institution to be selected by the Attorney General of the United States (interpreted) on each of the 11 counts for a period of 20 years (interpreted). I am sure that there are people who have been affected in their own lives and the lives of members of their family that would ask that these sentences run consecutively so that you would be put away for 220 years as far as they're concerned (interpreted), but I am pronouncing these sentences to run concurrently (interpreted).

As to the Defendant Barragan I sentence him to be confined to a penal institution to be selected by the Attorney General of the United States for a period of 15 years (interpreted), and again I would state to him that there are many, many persons, both in Government and out, victims, directly and indirectly, that would hope that these sentences would result in your being confined for a total of 60 years (interpreted), but these sentences are pronounced to run concurrently on each of the four counts (interpreted).

As to the Defendant Etta Rodriquez, she is to be confined to a penal institution to be selected by the Attorney General of the United States for a period

of nine years (interpreted) on each of the counts, the sentences to run concurrently.

As to the Defendant Amaro the defendant is to be confined to a penal institution to be selected by the Attorney General of the United States for a period of eight years (interpreted) on each of the counts, the sentences to run concurrently (interpreted).

The defendants are remanded to the custody of the Marshal to carry out the sentences.

Mr. Melee: If the Court please, I have one—I make the motion that the sentence commence on January 4th, 1963, your Honor. It's within the discretion of the Court.

The Court: I will grant that motion.

Mr. Melee: Thank you, your Honor.

Mr. Welch: That is for all defendants?

The Court: That will apply to all defendants.

Mr. Melee: If it please the Court, I have one other motion I would like to make, a motion——

The Court: Just a minute. Let's have the defendants in here if you are going to make a motion. What is it?

Mr. Melee: It is just proceeding in forma pauperis oath in behalf of Adolpho Rodriquez and Etta Rodriquez while they are before the Court. Hereafter if they are transported away we would have to have them returned to make the motion before the Court.

The Court: No, I don't wish to take up that motion at this time. It is five minutes after twelve. We have taken all morning on it. I have no idea what

your motion is. All motions also have to be in writing in this Court anyway as you know, Mr. Melee.

Mr. Melee: Yes, your Honor. All right.

(Adjournment taken.)

Certificate of Reporter

I, Audrey L. McCarthy, Official Reporter, United States District Court, do hereby certify that as such reporter I reported in Stenotype the proceedings had at the time of pronouncement of judgment in Cr. No. 13611, United States of America v. Adolpho Rodriquez, et al., and that the foregoing transcript, consisting of pages numbered 1 to 4, inclusive, is a full, true and correct transcript of the actual sentencing and the proceedings had after the sentencing.

Dated: December 23, 1968.

Audrey L. McCarthy
Official Reporter